STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

SBC Communications, Inc.,	**)**	
SBC Delaware Inc.,	**)**	
Ameritech Corporation,	**)**	
Illinois Bell Telephone Company	**)**	
d/b/a Ameritech Illinois, and	**)**	
Ameritech Illinois Metro, Inc.	**)**	
	)	
Joint Application for Approval of the	**)**	**Docket No. 98-0555**
Reorganization of Illinois Bell	**)**	
Telephone Company d/b/a Ameritech	**)**	
Illinois, and the Reorganization	**)**	
of Ameritech Illinois Metro, Inc.	**)**	
In Accordance With Section 7-204 Of	**)**	
The Public Utilities Act and for All	**)**	
Other Appropriate Relief	**)**	

COVAD COMMUNICATIONS COMPANY'S BRIEF ON EXCEPTIONS TO THE HEARING EXAMINERS' PROPOSED ORDER

INTRODUCTION

This proceeding was reopened on the Commission's own motion for the consideration of several issues identified by Chairman Mathias and Commissioners Kretschmer and Harvill. Additional evidence was prefiled and hearings were held to address those issues. On August 10, 1999, the Hearing Examiners' Proposed Order on Reopening was served on the parties. Covad Communications Company ("Covad") takes exception to several conclusions in the Proposed Order.

As discussed in more detail below and in Covad's Brief on Reopening, numerous problems are raised by SBC's and Ameritech Illinois' ("Joint Petitioners" or "SBC-

Ameritech") proposed Interconnection Commitment A. This commitment can be strengthened and improved to ensure that the commitment's intended results are achieved if SBC-Ameritech are required to offer Illinois competitive local exchange carriers ("CLECs") methods, terms and conditions that they offer CLECs in other SBC-Ameritech states -- regardless of whether those methods, terms and conditions were arbitrated in those other states. The Hearing Examiners appear to agree that the commitment should be revised in this manner. (*See* Prop. Ord., p. 139) However, in other portions of the Proposed Order it appears that the Hearing Examiners have come to the opposite conclusion. (*See* Prop. Ord., p. 140) Consequently, regardless of the conclusion reached by the Commission on this issue, the Proposed Order must be revised.

The Proposed Order also rejects Covad's proposal that Joint Applicants post a $300 million performance bond prior to the merger closing date to ensure compliance and to fund the various monetary commitments made by SBC-Ameritech in this proceeding. The Proposed Order concluded that this requirement was not necessary to insure that Joint Applicants' commitments are not illusory. (Prop. Ord., pp. 115-16) The evidence shows that this additional requirement would be beneficial and impose little cost on Joint Applicants.

Finally, Covad supported the position taken by McLeodUSA and ACI regarding the payment of special construction charges and access to Ameritech loop information. The Proposed Order summarily rejects McLeodUSA's and ACI's position on these issues. As discussed below, each of these issues is relevant and should be considered by the

Commission in this docket when ruling on whether and in what circumstances to allow the proposed merger.[1]

ARGUMENT

I. THE PROPOSED ORDER SHOULD BE REVISED TO STATE THAT SBC-AMERITECH MUST PORT TO ILLINOIS ARBITRATED METHODS, TERMS AND CONDITIONS OF INTERCONNECTION.

A. There is no sound basis for excluding arbitrated agreements from Interconnection Commitment A.

SBC-Ameritech have proposed to make available to Illinois CLECs through Interconnection Commitment A all negotiated interconnection methods, terms and conditions in effect in other SBC or Ameritech states, but *not* arbitrated methods, terms and conditions. The ostensible purpose of Interconnection Commitment A is to speed

[1]Covad's inclusion of these proposals should not be taken to mean that Covad believes that the SBC-Ameritech merger is in the public interest or that the commitments and conditions proposed by SBC-Ameritech in this proceeding and before the Federal Communications Commission ("FCC") on July 1, 1999 (SBC/Am. Ex. 5, Sch. 1) ameliorate or mitigate the anti-competitive impact of this transaction. Indeed, Covad has several serious objections to several of the commitments proposed by SBC-Ameritech to the FCC, and has proposed suggestions to ameliorate those concerns. (*See* Attachment A to Covad's Brief on Rehearing)

entry by CLECs into Illinois by making it easier for a CLEC to reach a negotiated interconnection agreement with SBC-Ameritech. Without the inclusion of arbitrated methods, terms and conditions, the actual impact of this commitment will be minimal.[2]

The overwhelming evidence establishes that SBC-Ameritech's Interconnection Commitment A would *not* make Illinois CLECs substantively better off since many significant issues, such as the methods, terms and conditions of unbundled xDSL loops already resolved in other SBC-Ameritech states would not be "ported" to Illinois. Rather, CLECs like Covad would be forced to settle for "second (or third, or fourth) best" agreements in Illinois, unless they are willing to negotiate the terms and conditions of interconnection with SBC-Ameritech. Since every month of arbitration is a month in which CLECs like Covad cannot enter the market or provide more efficient service to consumers, SBC-Ameritech have an incentive to continue this litigation. As proposed by SBC-Ameritech, Interconnection Commitment A does nothing to solve this problem and indeed could make it worse, since it would create an additional incentive for SBC-Ameritech to arbitrate rather than negotiate. (Covad Ex. 1, p. 9) In short, SBC-Ameritech's promise to provide only "voluntary" terms is not much of a concession.

As discussed in more detail in the next section and at pages 12 through 21 of Covad's Brief on Reopening, Covad's testimony shows that the manner in which SBC

[2]The Proposed Order fails to indicate that Covad supported amendments to Interconnection Commitment A which would require SBC-Ameritech to port to Illinois the methods, terms and conditions included in arbitrated agreements.

conducts itself in arbitrations and other regulatory disputes is inexorably linked to whether Interconnection Commitment A is sufficient to speed competitive entry. Covad's experience suggests that the Commission should not *solely* rely upon the arbitration process to open the Illinois market to competition, which is what it would be forced to do were it to adopt Interconnection Commitment A as proposed by SBC-Ameritech, since this would delay competitive entry. Rather, the Commission should give new entrants like Covad a better chance of quick entry by including arbitrated methods, terms and conditions in Interconnection Commitment A.

Including arbitrated methods, terms and conditions in Interconnection Commitment A would vastly speed the interconnection negotiation process and therefore promote competition in Illinois by making all SBC-Ameritech interconnection agreements available in Illinois. This process could result in implementation of a state-of-the-art interconnection agreement within 45 to 90 days. Illinois consumers would benefit by swifter, more efficient CLEC entry. Effective local competition would actually have a chance of developing. The State of Illinois would become a magnet for competitive entry by companies like Covad that provide innovative broadband services.

SBC-Ameritech would have this Commission believe that all 467 "negotiated" agreements" would be ported to Illinois" under Interconnection Commitment A. (*See* Tr. 1874-75, 1877) That characterization likely vastly overstates the number of agreements that could indeed be "ported" to Illinois under Interconnection Commitment A. That is because many of those 467 agreements are based upon previously arbitrated terms (such as the AT&T Agreement in Texas, which is the foundation of the "Proposed

Interconnection Agreement" in Texas). In other words, contrary to the impression left by SBC-Ameritech, many of the 467 negotiated agreements may not be "ported" to Illinois under Joint Applicant's commitment since they contain arbitrated provisions. (*See* Tr. 1875, 1932-33)

SBC-Ameritech make two arguments in opposition to porting arbitrated interconnection agreements to Illinois: (I) including arbitrated clauses would strip the Commission of its ability to implement and enforce Illinois law and policies; and (2) including arbitrated clauses would be unworkable because the network in Illinois may not be able to support a particular method, term or condition determined out- of-state. Neither of these arguments survives close scrutiny nor provides a sound rationale for distinguishing between "negotiated" and "arbitrated" methods, terms and conditions.

The Commission would not be "abrogating" its authority if Covad's proposal were adopted. Under Section 252 of the Telecommunications Act, the ICC must approve the terms of *all* interconnection agreements -- even those voluntarily negotiated pursuant to Interconnection Commitment A. If it determines the agreement is not in the public interest, it can reject the agreement. The Commission would also have the ability to ensure that ported methods, terms and conditions are otherwise consistent with the requirements of Article 13 of the Public Utilities Act. Thus, the Commission would *not* lose its ability to ensure that ported arbitrated methods, terms and conditions are consistent with Illinois laws and policies, and the public interest if Covad's position is adopted.

Most importantly, when it comes to the potential for abrogation of Commission authority, there is absolutely no difference between methods, terms and conditions that are

negotiated and those that are arbitrated. In other words, if SBC-Ameritech are correct that the Commission's authority would be compromised by "porting" out-of-state arbitrated clauses to Illinois, that authority would be equally compromised by porting negotiated clauses as SBC-Ameritech propose through their Interconnection Commitment A. SBC-Ameritech's rationale provides no sound basis for distinguishing between "negotiated" and "arbitrated" clauses.

In conclusion, SBC-Ameritech have not presented a sound substantive reason why "arbitrated" clauses should be excluded from Interconnection Commitment A. The arguments SBC-Ameritech raise apply with equal weight to "negotiated" clauses and therefore do not justify the distinction SBC-Ameritech have drawn. SBC-Ameritech's argument for discriminating against arbitrated clauses is simply a business choice: SBC-Ameritech do not want to extend their substantive losses in the arbitration process beyond state lines but they are more than willing to impose multi-state "voluntary" policies on Illinois CLECs. The Commission need not accept that decision. Covad's proposal is superior to SBC-Ameritech's proposal, and should be adopted.

B. The Proposed Order Incorrectly finds "Misleading" and Incorrect Covad's Testimony that Arbitrations are Time Consuming and Delay Competitive Entry.

The Proposed Order states (in its summary of Joint Applicants' position) that Covad's testimony regarding Covad's current arbitration with SBC's ILEC subsidiary in Texas, SWBT, was "highly misleading and that the delays Covad complained of were actually caused by itself." (Prop. Ord., p. 49) These conclusions are belied by the facts and evidence the Hearing Examiners' predisposition (based on their ruling to strike

portions of Covad's testimony, which was reversed by the Commission) to ignore Covad's testimony on this point. A balanced review of all the evidence and the Texas orders compels the conclusion that Covad was right on target with its criticisms of SBC.

The Hearing Examiners took the position at hearing that the facts surrounding Covad's arbitration with SWBT are not relevant to this Commission's determination because the Texas arbitration had not been concluded. (*See* Tr. 2584) While the Texas arbitration has not been concluded, after the close of hearings on reopening, the Texas Arbitrators reached a conclusion on the sanctions issue (and thus implicitly the issue of SBC's delay) granting in part Covad's motion and concluding that Mr. Deanhardt's allegations were correct.[3] The Hearing Examiners determined for some unknown reason to give no weight to the order issued by the Texas Arbitrators, which was provided as Attachment B to Covad's Brief on Reopening. An objective review of the facts in light of the Sanctions Order can lead to no conclusion other than that Covad's delays were caused by SBC.

The Texas Arbitrators found, as Covad witness Deanhardt claimed (*see* Covad Ex. 1, pp. 16-17), that SWBT engaged in a series of actions which prevented Covad from obtaining and reviewing important information regarding the central issues in the arbitration, which amounted to an abuse of discovery. (*See* Sanctions Order 20, p. 4) Contrary to the Proposed Order, the Arbitrators' Sanctions Order proves that Mr.

[3]The Arbitrators required SWBT to pay Covad's attorneys fees, expenses and costs as a result of SWBT's failure to produce the requested information. (Sanctions Order, p. 34) The Sanctions Order was issued July 27, 1999, pursuant to the Arbitrators' authority, but is appealable to the Texas Commission. (Rule 22.161(e)) A sanctions order is also

Deanhardt was correct. Specifically, Mr. Deanhardt claimed that the following discovery abuses occurred, and the Arbitrators agreed:

- Failing to produce responsive, relevant documents prior to the April arbitration hearing, which caused the Arbitrators to order an abrupt end to the hearings, that discovery be re-opened, and that hearings be rescheduled in June. (*See* Sanctions Order, pp. 4-5, 26-30, 33)

- Failing to search for requested documents from SWBT employees developing and implementing its retail and wholesale DSL strategies. (*See* Sanctions Order, pp. 4, 24-26, 29-30, 33)

- Producing only 7% of all responsive documents prior to the first arbitration hearing. (*See* Sanctions Order, pp. 4, 26-30, 33)

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automatically stayed pending appeal. (*Id*.)

- Offering as witnesses only members of SWBT's cadre of "professional" witnesses who are not directly involved in SWBT's DSL implementation plans.[4] (*See* Sanctions Order, pp. 4, 24-26, 33)

SBC chose not to rebut any of these factual statements - because it could not.[5]

The Hearing Examiners were apparently swayed by SBC's cross-examination of Mr. Deanhardt regarding delays Covad experienced in Texas. (*See* Prop. Ord., p. 49) What Mr. Deanhardt *actually* stated in cross-examination was that Covad's entry into the market was delayed by about six months as a result Covad's inability to reach agreement with SBC on the necessary terms and conditions of interconnection. (Covad Ex. 1, p. 5) When pressed on when those six months began, Mr. Deanhardt stated that the six months began in December of last year and continued until June when SBC was required to enter into the interim agreement. (Tr. 2458-59) Mr. Deanhardt stated that the delay was caused by SBC taking "unreasonable positions in the negotiations" which forced Covad to file for arbitration. (Tr. 2459-60)

[4]This conduct can be compared to SBC's conduct in this case wherein it presented a witness to rebut allegations regarding the Texas arbitration who had absolutely no personal, first hand knowledge regarding that arbitration. (*See* Covad Br. on Reopening, p. 13)

[5]SBC-Ameritech did little to rebut Mr. Deanhardt's testimony, other than to contend that Mr. Deanhardt's testimony was "inappropriate." (*See* SBC/Amer. Ex. 11.2, p. 3)

There is *not a shred of evidence* which supports the conclusion in the Proposed Order that SWBT was not responsible for Covad's delay in entering the Texas market. Although it had full opportunity to do so, SBC presented *no* testimony rebutting Covad's contention that it in fact was delayed by SWBT's conduct. Moreover, the questions asked by SBC's attorney are not themselves evidence and cannot be used as support for the conclusion reached by the Proposed Order. Looking solely to the *actual testimony* of record, which is the only information upon which the Commission may rely, there is absolutely no basis for disputing Covad's claim of a six-month delay. That conclusion is confirmed by the Orders issued by the Texas Arbitrators concluding that SWBT delayed Covad's entry into Texas. The Proposed Order's conclusion on this issue simply cannot stand.

SBC further attempted to show that by amending its arbitration petition, Covad caused the delay. (*See* Tr. 2502-05) What Mr. Deanhardt made clear is that the reason for the amendments was an effort by the parties to try to negotiate and work out these issues rather than having to arbitrate the issues, a result that would have been in both parties' interest. (Tr. 2564-66) Mr. Deanhardt was clear that filing the amended petitions "did *nothing* to affect the arbitration date, so ultimately the fact that we couldn't reach resolution of these issues caused this delay." (Tr. 2565; emphasis added) Again, SBC was unsuccessful in attacking Mr. Deanhardt's credibility or disproving his testimony that SBC's conduct delayed Covad's entry in Texas. The Hearing Examiners' conclusion is contrary to the evidence.

The Proposed Order was also apparently influenced by SBC's cross-examination of Mr. Deanhardt regarding an interim agreement that is now in place in Texas. (*See* Prop. Ord., p. 49) An objective review of the entire record, in light of the Texas Arbitrators' orders (both Interim Order 5 and the Sanctions Order), supports Covad's contention that SBC's conduct delayed Covad's entry into the Texas market. The evidence shows that the interim agreement was an extraordinary step taken pursuant to an order by the Texas Arbitrators requiring SBC to provide the services necessary for Covad to get up and running in Texas. SBC only entered into the interim arrangement after the Arbitrators ordered that *SBC remedy the **delay** caused by its actions in the arbitration*. (Tr. 2549-50; Cross Exhibit I) This interim order was issued because of the Arbitrators' concern that "unnecessary **delays** in these proceedings [were] causing harm to ACI and Covad."[6] (Cross Exhibit I, p. 2) The Arbitrators' concerns were "heightened" by "SWBT's position during the initial portion of the hearing" that it need not comply with the FCC's order on Advanced Services. (*Id*.)

The Proposed Order ignores the fact that Covad still does not have a permanent interconnection agreement with SBC. This is a serious omission. Since the pricing in the

[6]The interim agreement states that it is "not [to] be used by either party in the Arbitration or any other regulatory or judicial proceeding to characterize that the terms in the [interim] agreement are appropriate on an ongoing basis." (Cross Exhibit F, pp. 1-2) Thus, SBC-Ameritech's argument that the interim agreement provided Covad the terms it needs on an ongoing basis to operate in Texas must be disregarded by this Commission.

interim agreement is only temporary and subject to true-up once a final agreement is reached (*see* Cross Exhibit I, p. 4), any build out in Texas is at Covad's own risk because Covad has no idea what all of the permanent interconnection and UNE prices, terms and conditions will be. These facts establish what Covad has argued on reopening -- Covad has been **delayed** in entering the Texas market **as a result of the need to arbitrate with SBC** and **as a result of SBC's conduct in the arbitration**.

C. The Proposed Order is unclear as to whether Interconnection Commitment A should be revised to include arbitrated methods, terms and conditions.

It is not clear whether the Proposed Order adopts Covad's position that Interconnection Commitment A should be revised to include arbitrated methods, terms and conditions. At page 51, the Proposed Order states as follows:

> Certain parties have criticized Joint Applicants' commitment as being vague or illusory. One purpose of the follow-up questions in the June 15 letter was to clarify the commitment and obtain more detail about its implementation. We believe that Joint Applicants have provided the detail we sought, and that the limitations and caveats placed on the commitment are appropriate. Indeed, in many cases the limitations – such as that price terms from other states not be automatically imported to Illinois – are supported by Staff and are necessary to preserve this Commission's role in shaping competitive policy in Illinois. We believe one of AT&T's proposals best meets the problems outlined above by SBC and the CLECs. *Joint Applicants should provide CLECs in Illinois the same services, facilities or interconnection agreements/arrangements, except as to price, that any SBC ILEC affiliate has voluntarily negotiated, or has been ordered to provide under an arbitration in another state.* If SBC believes that a particular provision or agreement is technically unfeasible in Illinois, on contrary to Illinois law or policy, SBC would bear the burden of proof of same. SBC could also request a waiver of any provision or agreement/arrangement or arbitration. (Emphasis added)

The emphasized portion of the Proposed Order clearly adopts the position that Interconnection Commitment A should be revised to include arbitrated methods, terms and conditions.

Similarly, the Proposed Order confirms this conclusion at page 139 wherein it states, in relevant part, as follows:

> **A. Ameritech Illinois shall provide to CLECs in Illinois those services, facilities or interconnection agreements/arrangements offered by SBC in its in-region states subject to the following exceptions and conditions:**
>
> **_ Ameritech Illinois *shall be required to offer* to CLECs in Illinois UNEs, services, facilities or interconnection agreements/arrangements which have been imposed upon SBC by another state *as a result of an arbitration (as opposed to a voluntary agreement);* (Emphasis added)**

However, apparently in error, the Proposed Order reaches the opposite conclusion a few paragraphs later at page 140 wherein it states:

> **The Commission finds this condition to be valuable to CLECs and the expansion of the competitive market in Illinois, particularly since Section 252(i) of TA 96 does not contemplate automatic adoption of one state's approval of an interconnection agreement in other states. This is especially so where Ameritech Illinois is not a "party" to interconnection agreements in other SBC states. *In addition, the Commission also finds that excluding from the automatic requirements of this condition interconnection arrangements that are imposed upon SBC by arbitration retains for this Commission its ability to review Illinois interconnection agreements from an Illinois perspective, rather than adopting the policies of other states.* (Emphasis added)**

The Proposed Order must be revised to remove this internal inconsistency.

II. THE PROPOSED ORDER SHOULD BE REVISED TO REQUIRE SBC-AMERITECH TO POST A $300 MILLION PERFORMANCE BOND AS A CONDITION OF THE MERGER

Covad proposed that SBC-Ameritech be required to post a $300 million performance bond as a condition of the merger.[7] (*See* Covad Ex. 1, pp. 3-4) SBC-Ameritech opposed this proposal on the basis that it is punitive and unnecessary. The Proposed Order rejects Covad's proposal.

Covad's proposal would serve the public interest and promote competition in Illinois because it would ensure that SBC-Ameritech swiftly pay liquidated damages or strict liability fines that result from non-compliance with any Commission-imposed conditions or the provisions of the 1996 Act. At the same time, interest from the bond could be used to fund SBC-Ameritech's proposed multi-million dollar annual commitments to the Community Technology Fund, the Consumer Education Fund, and Illinois charitable donations, as well as Commission enforcement actions caused by this merger, such as additional staff, travel and consultants.[8]

[7]Covad has also proposed a performance bond requirement as a condition of FCC approval of the SBC-Ameritech merger.

[8]Between the ICC and FCC proposals, SBC-Ameritech have proposed more than *ten* collaborative-type processes, or network trials, audits or proceedings on topics that will greatly impact the development of competition in Illinois.

The Commission should not rely upon the ostensible pro-competitive benefits of the conditions it imposes on the merger without providing Staff adequate resources to ensure compliance with those conditions. Covad's proposed performance bond could be used to meet that objective.

SBC witness Kahan argued that a performance bond is only necessary if the Commission is concerned about SBC-Ameritech's ability to pay future fines or damages. (*See* SBC/Amer. Ex. 1.5 p. 15) Mr. Kahan's testimony begs the core reasons for Covad's performance proposal: the bond will facilitate immediate payment of damages to CLECs for breaches of the performance parity plan and fines, and interest on the bond would fund SBC-Ameritech's public interest commitments and ICC resource needs created by the merger. (Covad Ex. 1, pp. 3-4) A bond would also provide SBC-Ameritech with a much stronger incentive to comply with the merger conditions and the market-opening provisions of the 1996 Act than a "promise to pay" in the future. As the reciprocal compensation experience demonstrates, it can sometimes take years for CLECs to receive funds that are owed to them by ILECs. (*See* McLeodUSA Ex. 1, pp. 3-4)

The overwhelming evidence supports adoption of Covad's proposal that SBC-Ameritech post a performance bond in the amount of $300 million. The Proposed Order should be revised to include this proposal as a condition of the merger.

III. THE COMMISSION SHOULD ADOPT THE ACI AND McLEODUSA PROPOSALS REGARDING SPECIAL CONSTRUCTION CHARGES AND LOOP INFORMATION.

The evidence overwhelmingly establishes that special construction charges are a particular problem for CLECs providing DSL services. (*See* McLeodUSA Ex. 1, pp. 4-6; ACI Ex. 1.0, p. 9) This problem is exacerbated by Ameritech's refusal to provide CLECs information concerning its loops. The Proposed Order fails to specifically address this issue, concluding only that Joint Applicants' "commitment . . . represents a pro-competitive benefit to Illinois CLECs and end-users which would not exist without the merger." (Prop. Ord., p. 114) The Proposed Order must be revised to prohibit SBC-Ameritech from imposing on CLECs unreasonable and cost-prohibitive special construction charges, and then failing to provide them loop information.

Special construction charges are often assessed when the loop must be conditioned for certain services, or when the customer is served through the use of a digital loop carrier. These circumstances arise in the provision of xDSL services.[9] These non-recurring charges can amount to thousands of dollars depending upon the facility requested. This is true even though Ameritech imposes *no charge at all* on its end use customer when it provides the *same* service to the *same* location.

[9]Covad is a competitive local telecommunications service provider focused *entirely* upon deployment of competitive xDSL services nationwide. As of the date of the hearing, Covad's innovative next-generation DSL services were available in fifteen geographic regions and 36 MSAs. Covad has expanded since that time, and its service is now available in twenty-one geographical regions and 50 MSAs. Covad launched its service in the Chicago area on April 28, 1999. Covad plans to collocate in and provide service from dozens of central offices in the State of Illinois. Covad is the only competitive xDSL provider that markets both residential and business DSL services. (Covad Ex. 1, pp. 1-2)

The imposition of special construction charges is a competitive barrier to competition for xDSL services. (McLeodUSA Ex. 1, pp. 4-6)

Joint Petitioners contend that these special construction charges are appropriate since they result in the "cost causer" paying. (SBC/Am. Ex. 12.1, p. 16) The actual result of this practice is the cost causer pays twice. Under the forward-looking TELRIC pricing standards used to determine rates for unbundled loops, loop costs already include the costs to unbundle the loop. (McLeodUSA Ex. 1, pp. 4-6) Joint Petitioners' witness on this issue, Mr. Appenzeller, testified that he did not know whether the costs recovered through special construction charges, including those for conditioning the loop for xDSL service, are actually included in TELRIC-based UNE prices. (Tr. 2394-95) Mr. Appenzeller conceded that the CLEC does not cause the cost of conditioning the line since conditioning amounts to removing interferers that Ameritech has put on the system. (*Id*.) The Commission can reach no other conclusion but that special construction charges amount to a double-recovery windfall for Ameritech and a competitive, discriminatory barrier to CLECs' entry into the market.

This situation is complicated by Ameritech's refusal to provide CLECs with access to its existing databases which include information about the existence and type of copper facilities, the presence and types of digital loop carrier deployed, and the deployment of equipment such as load coils, taps and repeaters. As a result of this refusal, CLECs have no way of determining in advance whether there will be

impediments to using unbundled loops to provide service to a particular customer, or when Ameritech might attempt to apply special construction charges. (McLeodUSA Ex. 1, p. 5; ACI Ex. 1.0, pp. 10-12) This makes doing business difficult, to say the least.

In conclusion, the Commission should prohibit SBC-Ameritech from imposing unreasonable and cost-prohibitive special construction charges on CLECs. These charges are inconsistent with forward-looking TELRIC pricing of unbundled network elements, and are discriminatory. There is no valid reason for competitive carriers to be charged a special construction charge that Ameritech does *not* charge its own end users to provide the same loop at the same location to the same end user. Moreover, the Commission should require SBC-Ameritech to provide CLECs access to databases which include information about the existence and type of copper facilities, the presence and types of digital loop carrier deployed, and the deployment of equipment such as load coils, taps and repeaters, as a condition of approval of the merger.

CONCLUSION AND SPECIFIC EXCEPTIONS

As noted above, the Proposed Order is unclear as to whether it adopts Covad's and the other CLECs' proposed modification to Interconnection Commitment A. The Commission should conclude that Interconnection Commitment A will only speed entry by CLECs in Illinois if it includes arbitrated methods, terms

and conditions. This modification will strengthen and improve SBC-Ameritech's commitment to competitive entry. In addition, the Proposed Order should be revised to require SBC-Ameritech to post a $300 million performance bond prior to the merger closing date to ensure compliance and to fund the various monetary commitments made by SBC-Ameritech in this proceeding. The Proposed Order should be further revised to prohibit the imposition of special construction charges for the provision of xDSL unless: (1) it can be shown that the costs to be recovered through those charges are not already being recovered through the TELRIC pricing, and; (2) SBC-Ameritech charge their end use customers the same special construction charges. Finally, SBC-Ameritech should be required to provide CLECs access to necessary information concerning xDSL loops. The Commission must conclude that, only by taking these actions, will the promises of Joint Petitioners' proposal translate into actual public interest benefits.

For the reasons discussed above and in Covad's Brief on Reopening, the Proposed Order must be revised as follows:

1. The fifth full paragraph on page 140 of the Proposed Order should be revised as follows:

> **The Commission finds this condition to be valuable to CLECs and the expansion of the competitive market in Illinois, particularly since Section 252(i) of TA 96 does not contemplate automatic adoption of one state's approval of**

an interconnection agreement in other states. This is especially so where Ameritech Illinois is not a "party" to interconnection agreements in other SBC states. In addition, the Commission also finds that ~~excluding from~~ including in the automatic requirements of this condition interconnection arrangements that are imposed upon SBC by arbitration ~~retains for~~ does not abrogate this Commission's ~~its~~ ability to review Illinois interconnection agreements from an Illinois perspective, rather than adopting the policies of other states.

2. The second full paragraph in the section entitled "Joint Applicants' Response" in the "Interconnection" section at page 50 of the Proposed Order should be revised by deleting the last sentence which states: "Moreover, cross-examination showed that testimony to be highly misleading and that the delays Covad complained of were actually caused by itself."

3. The third paragraph in the "Commission Analysis and Conclusion" in the "Interconnection" section at page 51 of the Proposed Order should be revised as follows:

> **Certain parties have criticized Joint Applicants' commitment as being vague or illusory. One purpose of the follow-up questions in the June 15 letter was to clarify the commitment and obtain more detail about its implementation. We believe that Joint Applicants have provided the detail we sought, and that the limitations and**

caveats placed on the commitment are appropriate. Indeed, in many cases the limitations – such as that price terms from other states not be automatically imported to Illinois – are supported by Staff and are necessary to preserve this Commission's role in shaping competitive policy in Illinois. We believe one of AT&T's proposals best meets the problems outlined above by ~~SBC~~ Sprint, Covad and the CLECs. Joint Applicants should provide CLECs in Illinois the same services, facilities or interconnection agreements/arrangements, except as to price, that any SBC ILEC affiliate has voluntarily negotiated, or has been ordered to provide under an arbitration in another state. If SBC believes that a particular provision or agreement is technically unfeasible in Illinois, on contrary to Illinois law or policy, SBC would bear the burden of proof of same. SBC could also request a waiver of any provision or agreement/arrangement or arbitration.

4. The paragraph beginning on page 115 and carrying over to page 116 of the Proposed Order entitled "Commission Analysis and Conclusion" in the "Enforcement: Liquidated Damages Provisions" section should be revised as follows:

We conclude that Joint Applicants' commitment to import to Illinois the "Texas plan" for performance measures and incident-based liquidated damages provisions is responsive to our question and ~~adequately~~ addresses some of our concerns. It also represents a procompetitive benefit to Illinois CLECs and end-users which would not exist without the merger. Our goal is to ensure that any conditions imposed in this Order are not illusory, but rather are specific and enforceable, and that enforcement measures are adequate to ensure full compliance with the conditions. ~~The Texas plan and related commitments achieve these goals. In addition, we note that the FCC likely will impose performance and liquidated-damages condition of its own which, if they exceed the damages available under the Texas plan,~~

~~would also be available to CLECs in Illinois to the extent of any overage. Thus, Illinois CLECs will have the best of both worlds. With the proper incentives in place, we can be reasonably assured that the conditions we impose will be fulfilled and that CLECs and end-users will reap the benefits. Joint Applicants' commitments create such incentives.~~ However, several CLECs have raised issues regarding Ameritech's performance which cause the Commission to conclude that additional measures are needed to ensure that local competition will develop and that the combined SBC-Ameritech will comply with all regulatory requirements. The Commission concludes that the following conditions should be imposed on approval of the merger:

- Applicants shall not impose special construction charges for the provision of unbundled network elements unless: (1) it can be shown that the costs to be recovered through such special construction charges are not already being recovered through the TELRIC UNE pricing for the loop, and; (2) Applicants would charge their end use customer the same special construction charges if Applicants provided the same service to that end use customer.

- Applicants should provide to CLECs 24 hour on-line access to a computer database which contains information concerning the technical make-up of loops on its system, including physical medium of the loop (*i.e.*, copper or fiber); loop length in equivalent 26 gauge; the length and location of bridged taps; and the presence of load coils, repeaters, DLC systems or DAMLs.

- Applicants should post a $300 million performance bond payable to CLECs in the event of violations of the interconnection and unbundling requirements of TA96 or the conditions imposed by the Commission in this Order. The interest accrued on such bond which will be available for Commission enforcement efforts or to fund the public interest commitments

offered by Applicants. at the discretion of the Commission.

The Commission should not adopt the Proposed Order as its final order if these changes are not made.

Respectfully submitted,

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